

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIANE ENGLEMAN,

Defendant-Appellant.

UNPUBLISHED

November 13, 2003

No. 240363

Wayne Circuit Court

LC No. 01-004193

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for assault of a prison employee, MCL 750.197c. Defendant was sentenced to eighteen to forty-eight months' imprisonment. We affirm.

On appeal, defendant argues that her convictions should be reversed because of two instances of prosecutorial misconduct. Defendant first argues that the prosecutor's statement referring to defendant's sexual orientation in his opening statement denied her a fair trial. We disagree. We review de novo claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). This Court reviews preserved claims of prosecutorial misconduct case-by-case, by examining the prosecutor's remarks in context. *People v McLaughlin*, ___ Mich App ___, ___ NW2d ___ (2003) (Docket No. 234433, issued September 25, 2003), slip op at 4.

The prosecutor stated during his opening statement that defendant's motive for assaulting the prison employee (Officer Crystal Wheeler) might have been to get transferred to another facility where her "lover" was also going to be transferred. Defendant argues that the prosecutor intentionally injected this statement solely to arouse juror prejudice regarding defendant's sexual orientation. Reversal in such cases is appropriate "where potentially inflammatory references are intentionally injected, with no apparent justification except to arouse prejudice." *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). In this case, however, the prosecution appears to have raised defendant's sexual orientation in his opening statement because he planned to prove that the motive for defendant's assault on Officer Wheeler was to be transferred to another facility with her girlfriend.

The prosecution may have also raised defendant's relationship with her girlfriend because it would be relevant to show bias when defendant called her girlfriend to testify at trial. In an

opening statement, it is proper for the prosecutor to comment on the evidence he intends to present. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). The prosecution only made one comment during his opening argument that revealed defendant's sexual orientation, and this comment was made for the purpose of previewing the evidence he intended to present. This comment was not inflammatory or a blatant attempt to prejudice the jury. Furthermore, defendant was not prejudiced by the prosecutor's remark, because evidence of her sexual orientation was revealed by the testimony of her girlfriend, who defendant called as a witness.

Finally, any prejudice caused by the prosecutor's remark was cured by the prosecutor's statement during his closing argument and the trial court's instructions to the jury. During his closing argument, the prosecutor attempted to cure any prejudice when he made the following statement to the jury: "Don't let this become a case about sexual preference. It's not. The only reason that evidence was introduced was to show you that [defendant's girlfriend] has a bias. She wants to help her friend." The trial court also instructed the jurors not to let prejudice influence their decision and to base their decision on the evidence presented at trial. Therefore, we conclude that the prosecutor's mention of defendant's sexual orientation during his opening statement did not deny defendant a fair or impartial trial.

Defendant also argues that the prosecutor's comments during his closing argument regarding defendant's failure to produce certain witnesses impermissibly shifted the burden of proof to defendant. We disagree. Because defendant did not object to this instance of alleged misconduct, our review is limited to determining whether there was a plain error that affected defendant's substantial rights. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.*

At trial, defendant testified that she had filed numerous grievances on behalf of other inmates against Officer Wheeler. Defendant explained that these inmates were not called to testify because her attorney told her that they should not be called because they were not witnesses to the assault. During his closing argument, the prosecutor stated, "Where are all of these witnesses that have been abused by Officer Wheeler? Where's this committee that has all these horrible things to say about Officer Wheeler? You can't call them as witnesses? They have the same subpoena power as the People have." Defendant argues that these remarks impermissibly shifted the burden of proof from the prosecution to the defense by implying that defendant should not have followed her attorney's advice not to call the mentioned witnesses.

A prosecutor's comment on the defendant's failure to call a witness does not shift the burden of proof as long as such comment does not burden the defendant's right not to testify. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). " '[I]t is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely.' " *Id.* at 111 n 21, quoting *United States v Bright*, 630 F2d 804, 825 (CA 5, 1980).

[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a

theory, argument on the inferences created does not shift the burden of proof. [*Id.* at 115.]

The prosecutor's comments during his closing argument, regarding defendant's failure to call as witnesses the inmates who had grievances against Officer Wheeler, were designed to show that defendant's testimony was not supported by corroborating evidence. By making this argument, the prosecutor was commenting on the validity of the testimony advanced by defendant. *Id.* at 115. Therefore, the prosecutor's comments regarding the lack of witnesses called to corroborate defendant's theory did not shift the burden of proof to defendant. Additionally, the court instructed the jury that the prosecutor had the burden of proving each element of the crime, and that defendant was not required to prove her innocence or "to do anything." Furthermore, the trial judge's instruction that the arguments of the attorneys are not evidence dispelled any prejudice. *People v Schutte*, 240 Mich App 713, 721-722; 613 NW2d 370 (2000). Therefore, we conclude that the prosecutor's remarks did not amount to a plain error that affected defendant's substantial rights.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio